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IN THE COURT OF APPEAL OF NEW ZEALAND

CA270/06

THE QUEEN

v

JONATHON STEVEN MANN

Hearing: 28 November 2006

Court: Chambers, Randerson and Potter JJ

Counsel: P J Davey for Appellant
M D Downs for Crown

Judgment: 13 December 2006 at 3 pm

JUDGMENT OF THE COURT

A Leave to appeal is granted but the appeal is dismissed.

B An order is made that this judgment and the reasons therefor are not to be published in the news media or on the internet or other publicly accessible database until final disposition of trial. Publication in a law report or law digest is, however, permitted.

REASONS OF THE COURT

(Given by Potter J)

Introduction

[1] The appellant, Jonathon Steven Mann, is charged with two counts alleging offending on or about 6 August 2004 at Auckland:

1) With intent to obtain a pecuniary advantage he dishonestly and without claim of right obtained a document namely a cheque numbered 00 0003 drawn on the account of Ms M D Aspden at the Woolwich Bank Bexley Heath for £5,800.

2) With intent to obtain a pecuniary advantage he dishonestly and without claim of right used that cheque.

[2] The appellant appeals against a pre-trial ruling by Judge M H W Lance QC in the District Court at Auckland on 20 July 2006. The Judge ruled admissible at the appellant's forthcoming trial evidence of certain documents obtained by the complainant pursuant to an order from the Family Court made on 21 July 2005, namely:

a) Bank statements relating to the appellant's account at ASB Bank, Newmarket; and

b) A cheque for £5,800 drawn on the complainant's account with Woolwich Bank in England.

[3] The issue at the heart of the Judge's ruling and this appeal is whether the evidence should be ruled admissible when it was obtained by the complainant in breach of an implied undertaking to the Court to use the documents disclosed pursuant to the Family Court order, only for the purpose of the Family Court proceedings.

[4] The Judge also declined an application to stay proceedings. There is no appeal against that ruling.

Crown case

[5] The Crown alleges that between 1 November 2003 and 6 August 2004 a Woolwich Bank cheque in the name of the complainant was stolen from the owner (the complainant) and on or about 6 August 2004 the appellant wrote the cheque out to himself. It is alleged that he forged the complainant's signature and presented the cheque to ASB Bank, Newmarket using it to withdraw £5,800 from the complainant's Woolwich Bank account and transferring the money to the appellant's ASB Bank account. At that time £5,800 was equivalent to NZ$16,192.02.

Factual background

[6] The background to this matter is important and is set out in the Judge's ruling. It may be summarised as follows.

[7] The appellant and the complainant were in a relationship in England. They moved to New Zealand in late January 2003 but the relationship had ended by November 2003. In September 2004 the complainant commenced relationship property proceedings in the Family Court. In her deposition statement she alleged the appellant refused to disclose his bank statements for the purposes of the Family Court proceedings. She engaged a private inquiry agent and learnt through the agent that the appellant had opened a term deposit account with ASB Bank, Newmarket with a monetary value of approximately $16,000. She acknowledged she did not have any authority from the appellant to obtain this information. She also acknowledged that without his authority she had re-directed his mail to her, which included bank documentation.

[8] On or about 27 August 2004, the complainant went to the appellant's flat. She was granted access to the appellant's bedroom by a flatmate. She found there a cheque for £6,000 drawn on her Woolwich Bank account with the number 00 0004.

She claimed the cheque was not in her handwriting and she made a complaint to the police which resulted in the appellant receiving a warning from the police.

[9] On 21 July 2005 the Family Court made an order requiring ASB Bank to produce the following documents to the complainant:

> Copies of all bank statements in the name of Jonathon Steven Mann and Jonathon Steven Macdonald from 1 September 2003 until 22 March 2005.
>
> Documentary evidence of disposition of $21,195 withdrawn from Jonathon Steven Mann's ASB Streamline account on 1 September 2004.

[10] The order was sealed on 15 September 2005. The complainant took it to ASB Bank Newmarket, and obtained documentation from the Bank including the appellant's bank statements which showed the deposit of $16,197.04. The Bank also disclosed a copy of the cheque for £5,800 that had been scanned into the Bank's database before being sent to the complainant's bank in England for payment. This cheque was not within the strict terms of the Family Court order but there can be no doubt it was provided to the complainant by the Bank because she had the order from the Family Court.

[11] On 12 October 2005 the complainant made a complaint to the police that the appellant had filled out and presented the cheque for £5,800 without her authority. She provided to police the bank statements and copies of the cheques drawn on her Woolwich Bank account.

[12] The complainant had not obtained a release from the implied undertaking to the Family Court that arose from the Court's order for discovery, to use the documents only for the purpose of the proceedings. We note that the implied undertaking in the case of documents produced for inspection under the Family Court Rules 2002 is made explicit by r 149(3) and is therefore also a statutory obligation.

The pre-trial ruling

[13] Judge Lance stated it was common ground that when a Court makes an order for discovery there is an implied undertaking to the Court by all persons receiving documents pursuant to the order that they will not be used for any collateral or ulterior purpose, and any breach of that implied undertaking is a contempt of court. He said that applying those principles to the facts of this case it was clear that the complainant should not have used the order to obtain the documentation from ASB Bank and make it available to the police, and that in doing so she was in contempt of court.

[14] The Judge referred to the discretionary jurisdiction of the Court to exclude improperly obtained evidence to prevent an abuse of its process and cited from the judgment of this Court in *R v Holford* [2001] 1 NZLR 385 at [15] and [18]:

> The jurisdiction of the Court to exclude improperly obtained evidence as a matter of discretion, is part of the general jurisdiction to prevent abuse of process. It is independent of any remedy under s 21 of the New Zealand Bill of Rights Act 1990. The jurisdiction permits evidence to be ruled out 'on the grounds of unfairness to the accused'.
>
> It is still necessary for the appellant to satisfy the Court that the evidence should be excluded to prevent abuse of process unfair to him. Illegally obtained evidence is admissible unless its admission would amount to abuse of process. Illegality of itself is therefore insufficient to establish abuse of process which is unfair to the appellant.

[15] He noted the appellant's submission that because the bank statements and cheque were obtained by the complainant in breach of the implied undertaking, thus amounting to a contempt of court, the Court should exercise its discretion to rule the documentary evidence inadmissible on the grounds of unfairness to the accused.

[16] He turned to consider the concept of "inevitable discovery" and stated that:

> Even though, as in this case, a breach of an implied undertaking was the effective cause of the evidence being obtained, the Court should be slow to exercise its discretion to rule the evidence inadmissible if it would have been inevitably discovered in the course of time and, perhaps, by proper Police methods.

[17] He stated at [12]:

> Thus it is necessary to look at the "inevitability" of the documentation being discovered. In this case the complainant was the only signatory to the account. There is not only a certain inevitability, but likely relatively quickly after the event, that the complainant would have discovered the unauthorised transaction on receipt of her own bank statements. That surely would have alerted her to the bogus transaction thus entitling her to copies of the documentation in support including the cheque and ultimately recognition of a forged signature. With that information and documentation she would have been able to present it to the police who, in turn, would have been entitled to obtain a search warrant and thus, ultimately, track the defalcation.

[18] The Judge concluded at [13]:

> In my view the certainty of the discovery of the unauthorised transaction is patently clear. I find the Crown have discharged the onus of demonstrating the inevitability of a discovery of the documentation such to overcome the concerns in *Pratt* and, in my view, particularly where the police were not directly involved in obtaining the documentation, to admit the evidence is a proper exercise of the Court's discretion and, in the circumstances, not unfair to the accused.

Appellant's submissions

[19] Mr Davey submitted:

(a) The factual finding that the documentation would have inevitably been discovered by the complainant was not open to the Judge on the evidence and was plainly wrong;

(b) The evidence should in any event have been excluded on the grounds of fairness to the appellant.

Factual finding

[20] Counsel accepted that the Judge correctly applied the relevant legal test, namely that the Crown was required to prove that the evidence would, not could, have been discovered by lawful and reasonable means: *R v Butcher & Burgess* [1992] 2 NZLR 257 (CA); *R v Pratt* [1994] 3 NZLR 21 (CA); *R v Shaheed* [2002] 2 NZLR 377 (CA).

[21] He contended, however, that the Judge was wrong to reach the conclusion on the basis of the evidence given at depositions, that the complainant would inevitably have discovered the documentation. He suggested that perhaps the Judge had mistakenly thought the cheque for £5,800 was presented in August 2005 which would have been shortly before the order for discovery was sealed in the Family Court on 15 September 2005. He noted the cheque was deposited into the appellant's bank account at ASB Bank on 6 August 2004, and therefore on the complainant's evidence she had not independently discovered the transaction for over 12 months.

[22] Further, the complainant's evidence was that on 27 August 2004 she found at the appellant's flat another cheque dated 6 August 2004 drawn on the same bank account for £6,000, but discovery of that cheque, which was numbered 0004, apparently did not lead her to discover the previous cheque numbered 0003 had been transacted through her bank account. While she stated that she destroyed the cheque book on instructions from the Woolwich Bank in August 2004, she apparently did not make inquiry with her bank about any other cheques that might have been transacted through her account.

[23] Counsel also referred to the complainant's evidence that bank statements in respect of her Woolwich Bank account would be sent to her property in England and that her tenants would send them in the mail to her about every six months. He noted that in over a year that course of conduct had not revealed to her the withdrawal of the significant sum from her bank account.

[24] Mr Davey submitted that given the delay of over 12 months between the transaction on 6 August 2004 and the production of documents under the Family Court order, and the intervening discovery of the cheque for £6,000, it was not open to the learned Judge reasonably to draw the inference that the complainant would (as opposed to could) have inevitably discovered the transaction.

[25] The Crown pointed to the fact that the complainant was the only signatory on her Woolwich Bank account; that it was not an account she wanted, but provided an overdraft facility which automatically attached to her two rental properties in

England, both of which were solely in her name, and that she had never used the account and destroyed the cheque book for it in August 2004 at about the same time she discovered the cheque for £6,000 in the appellant's possession. The Crown emphasised there was no evidence the complainant had in fact ever received a bank statement alerting her to the unauthorised draw-down or withdrawal of her funds. On the contrary, it was quite clear she knew nothing of the transaction until she read the ASB Bank documents and then rang her own bank (Woolwich) for confirmation.

[26] We accept that the factual finding made by the Judge was open to him. The passage of time between the cheque for £5,800 being transacted through the complainant's account and her discovery of the transaction is explicable in the particular circumstances of the case, and does not negate the conclusion that the complainant would inevitably have discovered the unauthorised transaction. Once the complainant did see a bank statement, as was bound to happen, it was almost inconceivable that she would not notice and then query a cheque debit, given that she herself never drew cheques on the account.

Fairness

[27] The question then arises whether the evidence should have been excluded on the basis of fairness to the appellant because of the means by which the evidence was obtained.

[28] Mr Davey submitted that the Judge placed undue weight on the concept of "inevitable discovery" in exercising the discretion that was available to him. In any event, he submitted, the evidence should have been excluded on the grounds of fairness to the appellant because the complainant had used the documentation in breach of the implied undertaking in civil proceedings not to use discovered documents for an ulterior purpose.

[29] Counsel emphasised the significance of the implied undertaking, referring to the judgment in *Wilson v White* (2004) 17 PRNZ 537 at [20] where this Court stated the reasons for the implied undertaking as being two-fold:

(a) The first is a concern that unless there are restrictions on the uses to which discovered documents can be put, parties to litigation may not comply with their discovery obligations; and

(b) Secondly, a sense of fairness associated with the privacy expectations of a party who is required to produce documents for one purpose and is entitled to expect that they will not be used for another.

[30] The Court continued at [21]:

> It is also elementary that the implied undertaking is given to the Court. The corollary of this was explained by Lord Oliver in *Crest Homes plc v Marks* [1987] 3 WLR 293; [1987] 2 All ER 1074 at p 298; p 1078:
>
> > But the implied undertaking is one which is given to the court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the court.

[31] In *Wilson v White* documents obtained on discovery were used by an unsuccessful candidate for a surgical position to support a complaint to a medical disciplinary body against the successful candidate. This Court dismissed an appeal against a finding by the High Court that the appellant was in contempt of court for providing the documents to the disciplinary body in breach of the implied undertaking to the Court.

[32] Counsel noted that while it was possible for the Court to release a party from the implied undertaking, and allegations of possible criminal conduct will often provide a good reason to grant a release, this Court in *Wilson v White* made it clear that the fact the information could have been obtained lawfully from another source (in that case, possibly under the Privacy Act 1993 or the Official Information Act 1982) did not detract from the fundamental obligations of a party who receives documents under discovery.

[33] It was submitted that in this case the complainant did not use the court processes fairly. She supplied the bank statements and cheque to the police in breach of an implied undertaking to the Court not to use those documents for any collateral or ulterior purpose. Mr Davey said that such an action strikes at the very heart of the implied undertaking and the fact that such a breach amounts to a contempt of court evidences the seriousness with which the Court views the integrity

of its processes. He submitted the evidence should therefore be excluded on the grounds of fairness to the appellant.

Authorities

[34] In *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, the House of Lords considered the issue of whether self-incrimination could be claimed to protect a party from having to answer interrogatories and discover documents. In the context of considering whether the party making disclosure would be at risk from self-incrimination, Lord Fraser said at 447:

> I cannot think that there would be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution, certainly if he had first obtained leave from the court which ordered the interrogatories, and probably without such leave.

[35] In *Home Office v Harman* [1983] 1 AC 280, a solicitor was found to be in contempt of court after she allowed a journalist to have access to discovered documents, after the contents of those documents had been read out in open court at the hearing. The documents were later ruled inadmissible.

[36] The majority in the House of Lords found that the documents were still subject to the implied undertaking despite having been read out (Lord Simon and Lord Scarman dissenting): no distinction was to be made between documents admitted in evidence and those that are not.

[37] Lord Keith of Kinkel at 308 said:

> The argument for the appellant, however, goes the length that because the public are notionally present [in open court], and anyone might have come in and noted down the contents of any discovered document which is read out, the implied obligation against improper use comes to an end. That is not a proposition which I can find acceptable upon any rational ground consistent with the proper administration of justice … . The implied obligation not to make improper use of discovered documents is, however, independent of any obligation existing under the general law relating to confidentiality. It affords a particular protection accorded in the interests of the proper administration of justice.

[38] In *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476, the Queensland Supreme Court considered the question of release from an implied undertaking not to use discovered documents for a collateral purpose. The plaintiff sought leave to disclose to the police and others, documents discovered to him in order that the police could investigate whether an offence had occurred. Lee J noted that Lord Fraser's comment in *Rank Film Distributors* was obiter, and expressed the view that leave was required even for disclosure of material suggesting criminal activity. However, the Court's discretion was wide and a balancing exercise was called for. After weighing all the relevant factors, the Court decided that the public interest in investigating a possible criminal offence, namely a Commonwealth officer breaching his duty by disclosing information, outweighed the public interest in the integrity of the discovery process.

[39] In *Commonwealth v Temwood Holdings Pty Ltd* [2001] WASC 282 Pullin J in the Supreme Court of Western Australia, disagreed with the obiter comment of Lord Fraser in *Rank Film Distributors*, preferring the view of Lee J in *Bailey* that leave was required before a party could be released from the implied undertaking not to use discovered documents for a collateral purpose. The Court considered that leave would not normally be granted if the interest to be promoted by disclosure was a private one but if a public interest was at stake, then it was a matter of weighing that public interest against the public interest in the integrity of the implied undertaking.

[40] In *Holford* the balancing exercise was said to entail:

> … consideration in the particular case of competing aspects of the public interest, including the public interest in effective prosecution (at [19]).

[41] This Court in *Holford* considered that some of the matters to be weighed in the balance were that the evidence was real evidence, it was obtained initially by lawful means (as was the evidence obtained in this case pursuant to order of the Family Court), the conduct in breach was not outrageous, and the criminal offending alleged was significant. It was also considered relevant in *Holford* that the actions in breach were not those of an agent of the State which would make discipline of them through exclusion of the evidence, a sensible response.

Balancing exercise

[42] In exercise of the Court's discretion in the circumstances of this case we consider the following factors to be relevant:

(a) The documents (bank statements and cheque) would have been inevitably discovered, as found by the Judge. Ultimately this information would have been available to the complainant through her bank, Woolwich Bank in England.

(b) The documents provided clear prima facie evidence of criminal offending.

(c) There is high public interest in the detection of crime.

(d) The evidence was real and available. It was not brought into existence by the wrongful act.

(e) There is no allegation of bad faith on the part of the complainant.

Mr Downs for the Crown accepted that the complainant's conduct in delivering to the police documents obtained pursuant to the Family Court order was "wrongful". He said that such acceptance would not extend, however, to a situation where information about the alleged criminal offending has been passed to the police to investigate, as distinct from providing the documents themselves. In essence, he contended that although the complainant acted wrongfully, there was no allegation or evidence of bad faith.

(f) Although the possibility of alternative lawful access to the documentation is not a factor that carries significant weight (*Home Office v Harman* and *Wilson v White)*, the documents would have been available to the complainant through her own bank and an application

to the Family Court would likely have resulted in the grant of release from the implied undertaking.

(g) The complainant's unauthorised access to the information in relation to the appellant's accounts at ASB Bank through use of a private detective and redirecting his mail prior to obtaining the Family Court order, fall for consideration against the background of the appellant's failure to meet his discovery obligations in the Family Court proceedings, which ultimately led to the Family Court order of 21 July 2005.

(h) Any wrongful act was not that of an agent of the State: *R v Holford*.

[43] There is a strong public interest in maintenance of the strict rule that a party who obtains documents on discovery is not entitled to use those documents except for the purposes of the proceeding. But illegality in obtaining the information is insufficient in itself to establish an abuse of process that is unfair to the appellant such that the evidence will be automatically rendered inadmissible. The Judge balanced the competing factors. He did not over-emphasise the inevitability of the discovery of the documents by lawful means. It was a factor carrying significant weight.

[44] In all the circumstances of this case, including that the documents provided clear prima facie evidence of criminal offending, we are satisfied the Judge did not wrongly exercise his discretion.

Result

[45] Leave to appeal is granted, but the appeal is dismissed.

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